No. 77-1659

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE CHASE MANHATTAN BANK, N.A., ET AL.,
PETITIONERS

v.

THE FINANCE ADMINISTRATION OF THE
CITY OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of October 2, 1978, inviting the Solicitor General to express the views of the United States in this case.

QUESTION PRESENTED

The United States will address the question whether Section 5219 of the Revised Statutes (12 U.S.C. 548) bars the imposition of the New York City com-

mercial rent tax upon national banks for periods prior to January 1, 1973.

STATEMENT

1. Petitioners are national banks that lease and occupy premises in New York City for the purpose of conducting their business activities. For their taxable years ended May 31, 1971 and May 31, 1972, New York City imposed a Commercial Rent or Occupancy Tax pursuant to Title L of Chapter 46 of the Administrative Code of the City of New York, as authorized by the legislature of the State of New York (Pet. App. E-5, E-9). The commercial rent tax is levied on persons occupying premises for commercial purposes and varies in accordance with the amount of rent paid. 1963 N.Y. Laws ch. 257, as amended by N.Y. Unconsol. Laws ch. 166, § 9447 (McKinney 1974) (Pet. App. H-1 to H-8).

Petitioners Chase Manhattan Bank, N.A. and Citibank, N.A. brought these proceedings in the Appellate Division of the New York Supreme Court challenging rent tax assessments against them in the respective amounts of $3,097,732.94 and $2,702,-909.84. They contend that Section 5219 of the Revised Statutes, as amended by the Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434 (12 U.S.C. 548), bars the imposition of the commercial rent tax upon national banks prior to January 1, 1973 (Pet. App. B-2 & n.1).

As the decision below observed (Pet. App. B-2 to B-3), state taxation of national banks has been the subject of a series of decisions of this Court and

federal legislation. In 1819, this Court held unconstitutional a state tax on the Bank of the United States on the ground that it amounted to "a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution." *McCulloch* v. *Maryland*, 4 Wheat. 316, 436-437 (1819). Subsequent to *McCulloch*, a long line of decisions by this Court established that the states are without power, unless authorized by Congress, to tax national banks. See, *e.g.*, *Owensboro Nat'l Bank* v. *Owensboro*, 173 U.S. 664, 668 (1899); *Des Moines Nat'l Bank* v. *Fairweather*, 263 U.S. 103, 106 (1923); *First Nat'l Bank* v. *Hartford*, 273 U.S. 548, 550 (1927); *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 244 (1931).

In response to these decisions, Congress enacted a series of statutes which in the aggregate allowed state taxation of national banks in any one of four specified ways in addition to taxes on their real estate.[1] See Section 41 of the Act of June 3, 1864, ch. 106, 13 Stat. 111; Act of February 10, 1868, ch. 7, 15 Stat. 34; Act of March 4, 1923, ch. 267, 42 Stat. 1499; Act of March 25, 1926, ch. 88, 44 Stat. 223, as incorporated in Revised Statutes Section 5219 (12 U.S.C. 548). This Court characterized the 1864 legislation as marking "the outer limit within which

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[1] The four specified ways were: (1) taxation of the shares of the bank; (2) the inclusion of bank dividends in the taxable income of a shareholder; (3) the taxation of banks on their net income; or (4) the imposition of a tax according to or measured by the bank's net income. See *Agricultural Bank* v. *Tax Commission*, 392 U.S. 339, 341-342 n.3 (1968).

States can tax national banks" (392 U.S. at 345). It therefore held that a state sales tax, which by its terms must be passed on to the purchaser, was invalid as applied to national banks because such taxes were not among the four specified methods of taxation permitted by Congress in 12 U.S.C. 548. *Agricultural Bank* v. *Tax Commission*, 392 U.S. 339 (1968).

After this Court's decision in *Agricultural Bank*, Congress concluded that there was "no longer any justification for * * * continuing to grant national banks immunities from State taxation which are not afforded State banks." S. Rep. No. 91-530, 91st Cong., 1st Sess. 2 (1969). Accordingly, Congress enacted both "permanent" and "temporary" amendments to Section 5219 of the Revised Statutes. See Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434. The "permanent" amendment provides that for purposes of state as well as federal taxation, "a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located" (Pub. L. 91-156, *supra*, at Section 2). However, the effective date of the "permanent" amendment was deferred until January 1, 1973 in order to permit the states to conform their tax statutes to the new provisions. See S. Rep. No. 91-530, 91st Cong., 1st Sess. (1969); Act of December 22, 1971, Pub. L. No. 92-213, Section 4(a), 85 Stat. 775.

The "temporary" amendment governs taxation of national banks during the transition period between the date of the Act (December 24, 1969) and the

effective date of the "permanent" amendment (January 1, 1973). Under the "temporary" amendment, the states could tax national banks on the same basis as state banks except that they could not impose a tax on intangible personal property and were limited in the manner in which they could tax national banks having a principal place of business in another state. Pub. L. No. 91-156, *supra*, at Section 1.

The "temporary" amendment was subject to a "saving provision" precluding, during the transition period, the imposition on national banks of new taxes (*i.e.*, taxes not authorized under Section 5219 as it read before the enactment of Pub. L. No. 91-156) unless the imposition of such taxes was "authorized by *affirmative action* of the State legislature after the enactment of this Act" (emphasis supplied). Pub. L. No. 91-156, *supra*, at Section 3(a). However, such affirmative action was not necessary for sales or use taxes, taxes on the execution or recordation of documents, or taxes on tangible personal property, where such taxes were "imposed by a State which does not impose a tax, or an increased rate of tax, in lieu thereof." Pub. L. No. 91-156, *supra*, at Section 3 (b)(3).

2. In this suit challenging assessments of the New York City commercial rent tax for the period June 1, 1970 through May 31, 1972, petitioners claimed immunity on the authority of Section 3(a) of Pub. L. No. 91-156, which protected them from losing any pre-existing immunity from state taxes unless and until the New York legislature took "affirmative action" to apply such taxes to them. In petitioners' view, the

New York City commercial rent tax, which had been in force since 1963, was neither newly enacted nor the object of the requisite "affirmative action" of the New York legislature prior to the assessments at issue. In response, the City contended that the 1970 modification of the rent tax, which increased the applicable rates, constituted the requisite "affirmative action" within the meaning of Section 3(a).

The Appellate Division of the New York Supreme Court upheld the assessments, with one justice dissenting (Pet. App. D). In a 4-3 decision, the Court of Appeals of New York affirmed (Pet. App. B). It held that the state legislature had taken the requisite affirmative action when it increased the general rate of the tax in 1970. Although there was no evidence that the legislature took this action with the intention of imposing the commercial rent tax on national banks, the court held that Pub. L. No. 91-156 did not require an express legislative intent to tax national banks (Pet. App. B-5 to B-7). As an alternative ground for its decision, the court held that the rent tax was a "tax on tangible personal property" under New York law and was therefore exempt from the "affirmative action" requirement of Section 3(a) of Pub. L. No. 91-156 by virtue of the exception in Section 3(b) (Pet. App. B-7 to B-9).

The three dissenting judges disagreed with respect to both grounds of the decision. In their view, the "affirmative action" contemplated by Section 3(a) required a "conscious and manifested determination on the part of the State legislature" to subject national banks to the imposition of the newly permitted state taxes (Pet. App. B-10). They further concluded that the 1970 action of the New York legislature in increasing the rent tax rates, taken wholly without reference to the federal statute, was not "affirmative action" within the meaning of the federal statute. Finally, the dissenting judges observed that the characterization of the rent tax under New York law as a tax on tangible personal property was not controlling for purposes of construing Section 3(b) of Pub. L. No. 91-156, and that respondents had never asserted that the rent tax was a tax on tangible personal property (Pet. App. B-9 to B-13).

DISCUSSION

The decision below erroneously imposed the New York City rent tax upon petitioners for periods prior to January 1, 1973.

1. The 1970 increase in the tax rate does not constitute the requisite "affirmative action" within the meaning of Section 3(a) of Pub. L. No. 91-156. Although Congress did not define the statutory term "affirmative action," the legislative history shows that a general increase in the rate of an existing tax, without an express intent to subject national banks to the tax, is not affirmative action. As the pertinent Senate Committee Report (S. Rep. No. 91-530, *supra*, at 6) explained, the reason for the requirement that "the imposition of the tax" be "authorized by [affirmative] action of the State legislature after the enactment [of Pub. L. 91-156]" was as follows:

The committee realizes that for many years the tax structure within the States has been drawn in recognition of the different positions of State and National banks with respect to liability for State taxes. In effect, the States have adopted many different formulas in an attempt to equalize the total tax burden between State and National banks. If by congressional action banks were automatically subject to taxes which they had not been previously paying, in addition to the taxes which they are now paying, the effect may be to destroy the degree of equality that the State Legislature, by conscious effort, attempted to achieve. Accordingly, the committee believes it wise *to require positive state legislative action as a prerequisite to the imposition on banks of the additional taxes authorized by the bill* [emphasis supplied].

Similarly, the Conference Report (H.R. Conf. Rep. No. 91-728, 91st Cong., 1st Sess. 5 (1969) (emphasis supplied)) states:

> [W]hile at the same time very firmly committing to * * * their own tax policies, the conference substitute includes a saving provision to the effect that except for sales taxes, documentary taxes, and property taxes, *a tax may not be applied to a bank after the enactment of this legislation unless* either the tax was applicable before the enactment of this legislation, or *the State legislature authorizes its imposition by affirmative action taken after the enactment of this legislation.*

The foregoing excerpts from the legislative history establish that for the transition period 1969-1973,

Congress sought to insure that national banks would not be subject to new state tax burdens unless the state legislature explicitly determined to impose them on such banks. This congressional intent is served where there has been conscious and deliberate action by the legislature, subsequent to the enactment of Pub. L. No. 91-156, to subject national banks to taxes from which they previously were immune. On the other hand, the congressional purpose would be thwarted when taxes not previously permitted are imposed upon national banks on the basis of actions of the legislature which manifest no conscious or deliberate choice to subject national banks to the tax pursuant to the expanded taxing authority provided by the amendment to 12 U.S.C. 548.

Here, the commercial rent tax at issue was first enacted in 1963 and antedates the 1969 amendment to 12 U.S.C. 548. It therefore could not be imposed upon national banks without the affirmative action of the state legislature. But the general increase in the tax rate enacted by the New York legislature does not manifest a conscious intent to impose the tax upon national banks that had previously been immune from such taxes. All such a general increase in rates manifests is an intention of the legislature to impose heavier tax burdens on those to whom the levy was properly applicable. It does not demonstrate an intent to extend the reach of the commercial rent tax beyond the bounds that then existed. Indeed, as the dissenting judges pointed out (Pet. App. B-11), "[n]o shred of contemporaneous proof suggests that either

the city administration or the State Legislature was even aware that section 5219 had been amended or that thereby the Congress had granted authority for expanded State taxation of national banks." In these circumstances, it cannot be said that the action of the New York legislature focused upon the tax status of the national banks so as to constitute the "positive State legislative action" required by Congress for the taxation of national banks during the interim period from December 24, 1969 until January 1, 1973.[2]

2. The alternative ground of the decision below is likewise erroneous. Section 3(b) of Pub. L. No. 91-156 provides that "affirmative action of the State legislature" is not required with respect to taxes on tangible personal property, if the State has not imposed a tax or increased a rate of tax "in lieu thereof" (see Pet. App. G-4). The court below alternatively held that the commercial rent tax was a tax on tangible personal property that did not require affirmative action of the state legislature. In so ruling, the court relied upon New York decisions that have characterized a leasehold as tangible personal property (see Pet. App. B-7 to B-9).

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[2] The decision below attempted to justify its holding on the further ground that the 1970 amendment to the statute constituted a re-enactment of the original 1963 law and therefore constituted the requisite "affirmative action" (see Pet. App. B-5 to B-6). See also Resp. Br. in Opp. 7-8. But since national banks were immune under the original statute, its re-enactment, without any conscious intent to tax national banks, is not the affirmative action by the state legislature contemplated by Congress.

But for purposes of this case involving the scope of a federal immunity statute, the characterization of the commercial rent tax does not turn upon state law. As this Court has observed, "[w]here a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930), as quoted in *Society for Savings* v. *Bowers*, 349 U.S. 143, 151 (1955). Accord: *Agricultural Bank* v. *Tax Commission, supra*, 392 U.S. at 347; *Diamond National* v. *State Equalization Board*, 425 U.S. 268 (1976); *id.* at 269 & n.2 (Stevens, J., dissenting); *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 609 n.7 (1975).

Here, the terms and structure of Pub. L. No. 91-156 convincingly refute the notion that a tax on rents imposed upon the lessee is a tax on tangible personal property. Section 1 of the statute explicitly distinguishes between taxes on real property or on the *occupancy* of real property on one hand (subparagraph (2)) and taxes on tangible personal property (not including cash or currency) on the other (subparagraph (4)). It is therefore apparent that Congress intended that a tax on the occupancy of real property be regarded as equivalent to a tax on real property and not to a tax on tangible personal property. Indeed, the insubstantiality of the alternative ground of the decision below is underscored by the fact that respondents have never asserted at any

stage of this litigation that the rent tax is a tax on tangible personal property within the meaning of Section 3(b) so as to be exempt from the affirmative action requirement of Section 3(a). Moreover, in their brief in opposition, respondents make no attempt to defend this alternative ground of the decision below.

3. We recognize that the question presented by the petition has no continuing significance because it involves the applicability of the New York City commercial rent tax on national banks only for periods prior to January 1, 1973. That fact would normally constitute appropriate reason for this Court to decline to exercise its discretionary certiorari jurisdiction. However, if the decision in this case is permitted to stand, we are advised by counsel for petitioners that petitioners will be liable for more than $9 million in taxes and interest for the periods at issue.[3] In our view, the patent misconstruction of the federal statute by the New York Court of Appeals in upholding these substantial assessments is a sufficient reason for review by this Court despite the limited effect of the decision below. Given the narrow scope of the issue and the full discussion of the

[3] The amounts at issue fall into three distinct categories: (1) taxes through May 31, 1972; (2) taxes for the period June 1, 1972-December 31, 1972; and (3) interest through December 31, 1978.

For petitioner Chase, the amounts in each of these categories are as follows: (1) $2,178,000; (2) $682,500; and (3) $1,810,500. For petitioner Citibank, the amounts are as follows: (1) $2,019,975; (2) $690,204; and (3) $1,706,206. For both petitioners, the total of these amounts is $9,087,385.

pertinent authorities in the papers filed by the parties, the Court may deem it appropriate to grant certiorari and summarily reverse. A similar course has been followed in the past when the Court has concluded that full briefing and argument are unnecessary. See, *e.g.*, *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974); *United States* v. *Pomponio*, 429 U.S. 10 (1976).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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DECEMBER 1978

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